

False or misleading referrals under the EPBC Act

Mees v Roads Corporation [2003] FCA 306

By Chris McGrath, Barrister-at-Law

In *Mees v Roads Corporation* [2003] FCA 306 (8 April 2003), Justice Gray of the Federal Court found that a referral by the Victorian Government of part of the proposed Scoresby Freeway near Melbourne to the Federal Environment Minister under s68 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act") contained information that was misleading. The Court found that the failure to state in the referral that it was likely that a further freeway link would need to be constructed across a particular area of environmentally sensitive land in the future as a consequence of the construction of the Scoreby Freeway was misleading in the context of the referral. The referral therefore potentially contravened s489 of the EPBC Act, which makes it a criminal offence to provide false or misleading information to the Minister to obtain an approval under the Act, although issues of Crown immunity and some evidentiary deficiencies arose in that regard.

The decision confirms the ability of conservationists to challenge false or misleading information contained in referrals using s475 of the EPBC Act, which is a remarkably powerful and novel avenue to attack deficiencies in environmental impact assessment procedures and in effect provides de-facto merits review for referrals under the Act. It highlights how the EPBC Act has dramatically improved the integrity of environmental impact assessment in Australia and provides a warning of the dangers of submitting false or misleading information under the Act. Justice Gray emphasised (at para 118):

"the referral document must contain information that is truthful and complete, so as not to mislead. The purpose of the EPBC Act, to protect the environment, would be subverted if the Environment Minister were to be called upon to make determinations in relation to proposals without full information of the kinds required by the EPBC Act and the EPBC Regulations."

The essential lesson to be drawn from the decision for developers, environmental consultants and their legal advisors is that documents supplied to the Commonwealth in referrals under the EPBC Act should provide a full and frank description of the proposed action **and** associated actions while analysis of the likely impacts should be clear, accurate and supported by adequate sampling and investigation to justify any comments, conclusions or recommendations made.

The decision should also be seen in the context of a case that is pending in the Federal Court concerning the EPBC Act, *Queensland Conservation Council & Anor v Minister for the Environment and Heritage* (No Q203 of 2002), which challenges a decision of the Minister not to consider major associated downstream development in assessing the impacts of the Nathan Dam, which is proposed to be built on the Dawson River in central Queensland. If the conservationists succeed in the Nathan Dam Case then, together with the decision in *Mees v Roads Corporation*, environmental impact assessment under the EPBC Act will require a level of integrity and rigour that is unprecedented in Australia

1 The decision is available on the internet at www.austlii.edu.au